

120 FERC ¶ 61,096
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

PPL Montana, LLC	Docket No. ER99-3491-009
PPL Colstrip I, LLC	ER00-2184-007
PPL Colstrip II, LLC	ER00-2185-007
PPL Montana, LLC, PPL Colstrip I, LLC and PPL Colstrip II, LLC	EL05-124-004

ORDER DENYING REQUEST FOR REHEARING

(Issued July 27, 2007)

1. On June 16, 2006, Montana Consumer Counsel (MCC) and the Montana Public Service Commission (Montana Commission) filed a request for rehearing of the Commission's order issued on May 18, 2006.¹ In the May 18 Order, the Commission found that PPL Companies² had rebutted the presumption of market power in the control area³ operated by NorthWestern Corporation (NorthWestern) and satisfy the Commission's generation market power standard for the grant of market-based rate authority. The May 18 Order also terminated a section 206 proceeding and dismissed a request for rehearing as moot.

¹ *PPL Montana, LLC*, 115 FERC ¶ 61,204 (2006) (May 18 Order).

² PPL Companies are PPL Montana, LLC, PPL Colstrip I, LLC, and PPL Colstrip II, LLC.

³ While for purposes of this order we refer to "control area," we note that the Commission adopted the use of "balancing authority area" instead of "control area" in *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July, 20, 2007), FERC Stats. & ¶ Regs. 31,252 (2007), 119 FERC ¶ 61,295 (2007).

2. In this order we address the arguments of MCC and Montana Commission that the Commission erred in granting PPL Montana market-based rate authority. We deny rehearing because their positions are unsupported by the evidence and otherwise conflict with our precedents. In summary, we find that PPL Montana does not have market power because it is neither a pivotal supplier (meaning that it can raise prices by withholding capacity) nor does it have market shares that would allow it to exercise market power. Rather, we find that, at most, PPL Montana has market shares of less than 25 percent under almost all load conditions and, at most, 27 percent under certain load conditions. Moreover, we find that the market to serve customers in Montana is unconcentrated, with many potential competing suppliers. This finding is corroborated by the actual results of a request for proposals (RFP) by NorthWestern, which induced multiple conforming bids to serve Montana customers. We also have carefully considered the adjusted and alternative market analyses prepared by MCC and Montana Commission, but find them flawed and otherwise inconsistent with our precedents. We also find that, even if we adopted many of the adjustments proposed by MCC and Montana Commission, PPL Montana's market shares would still be too low to raise competitive concerns.

3. In making these findings, we are cognizant of the concerns of the MCC and Montana Commission that NorthWestern's RFP resulted in significant price increases to Montana's consumers. Our duty, under the Federal Power Act (FPA), is to ensure that wholesale prices are just and reasonable and do not reflect the exercise of market power. We take that duty very seriously. We have carefully considered the evidence submitted by all parties and have found that PPL Montana does not have market power. We therefore cannot agree that these price increases reflect the exercise of market power. Indeed, we note that they are consistent with both regional and national trends. As indicated in the Commission's recent Summer Energy Market Assessment,⁴ electricity prices have risen in virtually every region of the country due to a number of factors, including increasing fuel costs and rising demand. These increases range from 20-30 percent nationally and the Northwest has not been immune to them, experiencing a 23 percent increase in power prices over the past year. According to NorthWestern, "as a result of [its] new power supply agreement [with PPL Montana], typical residential electric bills are expected to increase by approximately 7 percent beginning July 1,

⁴ See *Summer Energy Market Assessment 2007* at <http://www.ferc.gov/market-oversight/mkt-views/2007/05-17-07.pdf> (Summer Energy Market Assessment).

2007.”⁵ NorthWestern states that this agreement provides its Montana default supply customers “with a source of reliable electricity supply . . . at a significant discount to current market prices.” In sum, although we are sensitive to the impact of rising prices on Montana customers, we have no basis for concluding that they reflect the exercise of market power, and instead they appear to reflect changes in wholesale markets over the past ten years. We therefore deny rehearing.

Background

4. In 1997, the Montana State Legislature passed a law that established a framework for Montana’s monopoly electric utility industry to become competitive in the generation and sale of electricity. As a result of this electric restructuring initiative, in 1999, Montana Power Company sold its generation assets to a single purchaser, PPL Montana.⁶ This sale was consistent with Montana legislation and Montana’s competitive restructuring plan.⁷ In 2001, Montana Power Company sold its transmission assets to NorthWestern, who is the default supplier for retail electric customers in Montana.⁸ After the generation divestiture, PPL Montana agreed to supply power to Montana Power (and subsequently to NorthWestern).

5. On November 9, 2004, PPL Companies submitted for filing an updated market power analysis in compliance with the Commission’s May 13, 2004 Order.⁹ The Commission’s analysis of that filing indicated that PPL Companies failed the preliminary wholesale market share screen in the NorthWestern control area, and thus the

⁵ PPL Montana June 11, 2007 Letter Report and NorthWestern Press Release at http://www.northwesternenergy.com/aboutus/newsroom/display_news.aspx?M=1611&I=169&document_id=553.

⁶ *Montana Power Company and PPL Montana, LLC*, 87 FERC ¶ 61,344 (1999).

⁷ Montana Code Ann. § 69-8-204 (1997).

⁸ NorthWestern Request for Declaratory Order at 6, Docket No. EL06-105-000 September 12, 2006.

⁹ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). The May 13 Order addressed the procedures for implementing the generation market power screens announced on April 14, 2004 and clarified on July 8, 2004 in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh’g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

Commission instituted an investigation pursuant to section 206 of the FPA to determine whether the PPL Companies should be allowed to retain their market-based rate authority. The Commission also directed PPL Companies to: (1) file a Delivered Price Test (DPT) analysis; (2) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that they would adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.¹⁰

6. On November 14, 2005,¹¹ PPL Companies submitted a DPT analysis for 2004 and a separate DPT analysis based on 2006 projected data. Based on review of the 2004 DPT analysis, the Commission concluded that PPL Companies had rebutted the presumption of generation market power and satisfied the Commission's generation market power standard for the grant of market-based rate authority.¹²

7. On June 16, 2006, MCC and Montana Commission filed a joint request for rehearing of the May 18 Order.¹³ On July 3, 2006, PPL Companies filed an answer to the request for rehearing.

¹⁰ *PPL Montana, LLC*, 112 FERC ¶ 61,237 at P 201, 207-09 (2005) (September 1 Order).

¹¹ PPL Companies originally filed a DPT analysis on October 31, 2005, but later amended that filing with the DPT analysis filed on November 14, 2005.

¹² May 18 Order, 115 FERC ¶ 61,204 at P 30, 41, 65. The Commission stated that "For purposes of this order, the Commission reviews only the 2004 DPT constructed consistent with the April 14 and July 8 Orders which requires use of historical data. Accordingly, we do not consider the 2006 analysis."

¹³ NorthWestern also filed a request for rehearing of the May 18 Order. However, on July 14, 2006, NorthWestern, which had recently entered into a new long-term firm energy contract with PPL Companies set to commence in July 2007, filed a notice of withdrawal of its request for rehearing. NorthWestern requested that it remain a party to the above-captioned proceeding.

8. On June 11, 2007, PPL Companies filed a letter report.¹⁴ MCC filed a response to the report.

Discussion

A. Procedural Matters

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹⁵ prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept PPL Companies' answer and will, therefore, reject it. The Commission accepts NorthWestern's notice of withdrawal but acknowledges that it remains a party to the above captioned proceeding. We will accept PPL Companies' report filed on June 11, 2007 and MCC's response because they have provided information that assisted us in our decision-making process.

B. Request for Rehearing

10. As discussed below in greater detail, we will deny MCC and Montana Commission's request for rehearing of the May 18 Order. As we explain herein, the decisions in the May 18 Order are both consistent with Commission policy on how to measure market power in the context of certifying market-based rate authority, as well as reflect a thorough examination of the evidence provided by all parties in this proceeding. The decisions also are consistent with the Commission's policy as recently adopted in the market-based rate Final Rule in Order No. 697.

11. In their joint request for rehearing, MCC and Montana Commission argue that the Commission erred in granting PPL Companies market-based rate authorization and finding that PPL Companies do not have market power in the NorthWestern control area, and request that the Commission grant rehearing of the May 18 Order. MCC and Montana Commission state that, as a result of the May 18 Order, prices for power that PPL Companies charge to NorthWestern will double, which will, in turn, be passed on to Montana's retail customers. MCC and Montana Commission argue that the May 18 Order erred in the analysis of the PPL Companies' DPT, made determinations based on

¹⁴ The letter reports on the status of PPL Companies' voluntary commitment to sell up to 100 MW of discounted power for a two-year period beginning on January 1, 2007, the new seven-year supply agreement between PPL Montana and NorthWestern, and other wholesale transactions by PPL Montana in the NorthWestern control area.

¹⁵ 18 C.F.R. § 385.213(a)(2) (2007).

an irrelevant market, engaged in arbitrary and capricious treatment of evidence submitted by protestors, shifted the burden of proof to protestors, considered improper simultaneous transmission import limits, accepted a mitigation offer that does not mitigate market power, improperly ignored antitrust policy and made materially incorrect statements about protestors' filings.

12. Several of the issues raised by MCC and Montana Commission on rehearing relate to the use of, and methodology underlying, the DPT analysis in a market-based rate proceeding, including whether the Commission should use a standardized DPT approach or some other approach, and whether to use historical (in this case, 2004) data instead of projected data. As a result, we believe that a summary of the purpose and use of the DPT based on historical data in market-based rate cases is appropriate.

13. Under an approach that has been used by the Commission for several years, initial applications or reauthorizations for market-based rate authority are subjected to a conservative preliminary screen review to separate those filings that need closer review from those that do not. Those applications that fail this conservative preliminary test (as was the case with PPL Companies' filing) typically are reviewed under the DPT analysis, which is a more thorough and accurate tool for measuring market power both because it looks at many more time periods and product markets than the preliminary screens, and because it examines much more data than the preliminary screens. Specifically, the DPT analysis is used to determine whether a seller has horizontal (generation) market power, and it allows for examination of the existence of market power under a wide range of season and load conditions.

14. The DPT analysis works as follows: the relevant market is defined "by identifying potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity for each [of 10] season/load period."¹⁶ The results of the DPT can be used for pivotal supplier, market share and market concentration analyses. Examining these three factors with the more robust output from the DPT provides the Commission with a more complete view of the competitive conditions and the applicant's relative position in the relevant markets. By determining whether a seller has capacity that can compete in the market under various season and load conditions, the DPT provides a reasonably accurate picture of market conditions. Examining market conditions allows the Commission to determine whether a seller has market power. The DPT does this by examining short-term energy markets and, in particular, sellers' available generation capacity. Absent entry barriers,

¹⁶ May 18 Order, 115 FERC ¶ 61,204 at P 32.

and a specific finding of market power in short-term markets, the Commission believes that long-term markets can be expected to be competitive.

15. Regarding the Commission's reliance upon historical rather than projected data in analyzing market power studies in this context, the Commission's practice for many years has been to use a "snapshot in time approach" based on the most recently available historical data at the time of filing, *i.e.*, to rely upon studies based on unadjusted historical data. There are several reasons why this approach benefits customers and is otherwise in the public interest. First, historical data are more objective, readily available, and less subject to manipulation by applicants than future projections. If the Commission were to allow applicants to submit studies based on their future projections, then applicants would be able to selectively "cherry pick" those projected changes that benefited the applicant in obtaining market-based rate authorization while ignoring other equally likely future changes that would undermine the applicant's chances for obtaining such authorization. In this regard, we note that we refused PPL Companies' requests that we rely on its own studies based on projected data for this very reason, studies which PPL Companies state would have supported their claim that they do not possess market power.¹⁷ Second, this approach benefits customers, state commissions and other affected intervenors because it requires the use of a consistent methodology that can be replicated by intervenors, rather than allowing applicants to submit customized market power studies that, due to myriad selective adjustments, are difficult to analyze and can hide the presence of market power. Third, it is important to note that the "snapshot in time" approach does not preclude the Commission from considering future changes in market conditions; rather, the Commission's grant of market-based rate authority is conditioned, among other things, on the seller's obligation to inform the Commission of any change in status from the circumstances the Commission relied upon in granting it market-based rate authority. Accordingly, the market-based rate change in status reporting requirement allows the Commission to evaluate changes when they actually happen rather than relying on projections, making it unnecessary and redundant for the Commission to allow sellers to account for predicted changes in the DPT for market-based rate purposes.¹⁸

¹⁷ *Id.* at P 4 n.14.

¹⁸ We note that the change in status reporting requirement is triggered, among other things, when a seller acquires a net increase of 100 MW or more of generation. The change in status filing must be filed no later than 30 days after the legal or effective date of the change in status. In the case of power sales contracts with future delivery, such contracts are reportable 30 days after the physical delivery has begun. The Commission will review any change in status report, and may request additional information from the

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16. Use of a standardized DPT methodology based on actual, verifiable, historical data provides a valuable tool for assessing horizontal market power. Applying it on a consistent basis provides certainty to the industry and inures to the benefit of customers. As discussed more fully below, the Commission's analysis of the DPT studies filed in this record by PPL Companies and protestors was consistent with Commission precedent.

17. In the May 18 Order, the Commission evaluated evidence in the record according to the Commission's established rules and precedent and found that PPL Companies did not have market power. Based on that finding and relying on the evidence submitted before the Commission, the Commission found that PPL Companies had rebutted the presumption of market power and satisfied the Commission's generation market power standard for the grant of market-based rate authority. While the MCC and Montana Commission assert that granting PPL Companies market-based rate authority would lead to significant price increases, as discussed more fully below, they have not shown that PPL Companies have market power or that the price increases are the result of the exercise of market power, as opposed to other factors (*e.g.*, the increase in regional power prices since the original contract with PPL Montana was executed).

18. In short, the Commission has considered all relevant evidence, including all of the protestors' filings and alternative market power studies, and the Commission has used reasoned decision-making in accordance with long-standing Commission policy, in finding that PPL Companies rebutted the presumption of market power.

i. Commission Tests and Methodologies

19. MCC and Montana Commission argue that the May 18 Order is flawed because it rests "on the assumption that the results of a Commission-approved test are definitive on the question of whether the Commission may grant market-based rate authority consistent with its statutory mandate to ensure just and reasonable rates."¹⁹ MCC and Montana Commission state that "[t]his assumption is contrary to Commission precedent."²⁰

seller or determine whether it is appropriate to initiate a proceeding pursuant to section 206 of the FPA.

¹⁹ MCC and Montana Commission Request for Rehearing at 12.

²⁰ *Id.*, citing April 14 Order, 107 FERC ¶ 61,018 at P 40 (2004) ("The Commission does not believe it has the legal basis to approve market-based rates if the applicant has not mitigated market power.").

20. In responding to this argument, the Commission is hampered by the fact that the argument was made in summary form without any detailed explanation. Taken in context, we assume the MCC and Montana Commission are challenging the Commission's use of the DPT to determine whether a seller has generation market power and suggesting that such use is "contrary to Commission precedent." If that is the case, we disagree.

21. The Commission has consistently used the DPT since 2004 for market-based rate authority (and since 1996 in the case of reviewing mergers), and we recently codified its use for market-based rate applications in Order No. 697. Under this approach, when an applicant fails one or more of the indicative screens, consistent with Commission precedent, there exists a presumption of market power. The applicant must then either offer Commission-approved mitigation or it must rebut the presumption of market power by presenting a more thorough analysis using the Commission's DPT.²¹ The DPT is used to analyze the effect on competition for transfers of jurisdictional facilities in section 203 proceedings and uses the framework described in Appendix A of the Merger Policy Statement and revised in Order No. 642.²² The Commission has found that "the DPT is a well established test that has been used routinely to analyze market power in the merger context for many years."²³ Under the DPT, applicants must calculate, among other factors, the market concentration using the Hirschman-Herfindahl Index (HHI), to rebut the presumption of market power and that "... in the context of designing an analysis for granting market-based pricing for oil pipelines, concentration measures [such as HHIs]

²¹ May 18 Order, 115 FERC ¶ 61,204 at P 31, *citing* April 14 Order, 107 FERC ¶ 61,018 at P 105-12.

²² May 18 Order, 115 FERC ¶ 61,204 at P 31, *citing Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,984 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000) (Order No. 642), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

²³ May 18 Order, 115 FERC ¶ 61,204 at P 33.

can also be informative in assessing whether a supplier has market power in the relevant market.”²⁴

22. The DPT protects customers by providing a robust analysis of the market under varying load conditions and using several different measurement criteria. For example, the DPT considers both (i) whether the applicant is a "pivotal supplier" (meaning that it can increase prices by withholding capacity unilaterally) and (ii) whether the applicant's market share is sufficiently high, or the market is sufficiently concentrated, that the applicant can, whether acting alone or in concert with others, exercise market power. The DPT also analyzes market power under a wide range of load conditions. It requires the applicants to submit studies of ten different periods during which customers are served, including peak periods, super peak periods and off peak periods.

23. The Commission has relied on the DPT to provide an indication of generation market power in the market-based rate context in numerous previous orders.²⁵ In the April 14 Order (the same order that MCC and Montana Commission cite in arguing that the Commission's reasoning in this case is contrary to Commission precedent), the Commission stated that it will use the DPT to evaluate whether an applicant has rebutted the presumption of market power in generation necessary for a grant of market-based rate authority and that, following the Commission's review of the DPT analysis, the

²⁴ *Id.* at P 35, citing *Comments of the United States Department of Justice in response to Notice of Inquiry Regarding Market-Based Ratemaking for Oil Pipelines*, Docket No. RM94-1-000 (January 18, 1994) (“The Department and the Commission staff have previously advocated an HHI threshold of 2,500, and it would be reasonable for the Commission to consider concentration in the relevant market below this level as sufficient to create a rebuttable presumption that a pipeline does not possess market power.”).

²⁵ *See, e.g., Kansas City Power and Light Co.*, 113 FERC ¶ 61,074 (2005); *PacifiCorp*, 115 FERC ¶ 61,349 (2006); *Tucson Electric Power Co.*, 116 FERC ¶ 61,051 (2006); *Acadia Power Partners, LLC*, 113 FERC ¶ 61,073 (2005); *Entergy Services, Inc.*, 111 FERC ¶ 61,507 (2005); *LG&E Energy Marketing, Inc.*, 113 FERC ¶ 61,229 (2005); *Public Service Company of New Mexico*, 115 FERC ¶ 61,090 (2006); *Southern Company Energy Marketing, Inc.*, 112 FERC ¶ 61,054 (2005); *order on reh'g*, 119 FERC ¶ 61,301 (2007).

Commission will issue a subsequent order making a definitive finding as to whether the applicant has market power.²⁶

24. For the reasons cited in these prior proceedings, we are not persuaded by MCC and Montana Commission's argument against using the DPT to determine whether the applicant has market power in generation. Accordingly, we reject MCC and Montana Commission's argument that the DPT is not a valid test for measuring the existence of market power or authorizing sales at market-based rates.²⁷

ii. Appropriate and Relevant Markets Studied

25. MCC and Montana Commission argue that the May 18 Order erred in analyzing an irrelevant product market. MCC and Montana Commission argue that the Commission should have analyzed the market for long-term, firm power in the NorthWestern control area for sales beginning in July 2007, rather than the spot market and short-term energy market. MCC and Montana Commission argue that the market for long-term, firm power is the relevant market to study because NorthWestern's then-current contracts for long-term, firm power to serve most Montana retail customers were set to expire in June 2007. According to MCC and Montana Commission, the market for long-term, firm power is the correct market to analyze because that is the market in which PPL Companies "hopes to make power sales to dependent customers"²⁸ and the market in which PPL Companies have monopoly power. Thus, MCC and Montana Commission argue, the Commission erred in the May 18 Order by evaluating the spot market and short-term energy market rather than the relevant long-term, firm energy market.²⁹

26. MCC and Montana Commission also argue that the May 18 Order does not justify the Commission's approval of a DPT analysis that ignores the relevant market of long-term, firm power for Montana's default power supply for purchases beginning in July 2007. MCC and Montana Commission state that the Commission avoids this question by stating that PPL Companies applied the DPT in accordance with Commission rules.

²⁶ April 14 Order, 107 FERC ¶ 61,018 at P 208-10.

²⁷ We note that the Commission in Order No. 697 recently affirmed that it would continue to use the DPT analysis for sellers that fail the market power indicative screens. Order No. 697, FERC Stats. & Regs. 31,252 at P 13, 104.

²⁸ MCC and Montana Commission Request for Rehearing at 14.

²⁹ *Id.* at 12-14.

However, MCC and Montana Commission argue that, even if PPL Companies had applied the DPT in accordance with Commission rules, the results cannot be definitive on the question of whether the Commission may, consistent with the FPA, allow PPL Companies to sell at market-based rates.

27. We do not agree with the MCC and Montana Commission and summarize the reasons therefor here. First, the DPT analyzes market power under a wide range of system conditions in short-term markets. If, as here, the DPT study shows that an applicant does not have market power in short-term markets, it is reasonable to conclude that, absent barriers to entry, the applicant will not have market power in long-term markets. This is because, over the long run, the applicant will not only face competition from existing generating plants but also competition from new entry of additional generation plants. Second, MCC and Montana Commission are incorrect in arguing that the Commission ignored the evidence regarding NorthWestern's RFP. The Commission closely considered that evidence and determined that it corroborated the results of the DPT because there were a wide range of suppliers that submitted conforming bids. Third, the Commission has considered Electric Quarterly Report (EQR) data filed by participants in the region. This data confirmed that many suppliers compete to serve NorthWestern's load. We explain each of these points in more detail below.

28. With regard to the short-term market, the May 18 Order explains that the DPT defines the relevant market "by identifying potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity for each [of 10] season/load period."³⁰ In this manner, the DPT measures market shares in all relevant time periods in the short term. These time periods are the most susceptible to the exercise of market power through withholding or collusion. The market shares for each season/load condition reflect the costs of the sellers' and competing suppliers' generation, thus giving a more complete picture of the sellers' ability to exercise market power in a given market. For example, in off-peak periods, the competitive price may be very low because the demand can be met using low-cost capacity. In that case, a high-cost peaking plant that would not be a viable competitor in the market would not be considered in the market share calculations, because it would not be counted as economic capacity in the DPT.

³⁰ May 18 Order, 115 FERC ¶ 61,204 at P 32. The seasons/load periods studied are super-peak, peak and off-peak for winter, shoulder and summer periods and an additional highest super-peak for summer.

29. If a seller is found not to have market power in the short-term market, then it is reasonable to presume that that seller would not have market power in long-term markets, absent entry barriers. This is because, in the absence of entry barriers, long-term capacity markets will be inherently competitive because new market entrants can build alternative generation supply.³¹ In contrast to the MCC and Montana Commission's unsubstantiated claims of the existence of barriers to entry, there is ample evidence in the record of new market entrants in the 2004 time period who were willing to compete to build new generation supply to become available in 2007. For example, as part of the RFP, NorthWestern received at least four bids from projects proposed to be built in time to commence operations in 2007.³² Moreover, two bids from proposed new wind and coal projects (the latter due to commence commercial operation in 2008) were short-listed by the independent consultant.³³ The wind project was one of the winning bidders, with NorthWestern entering into a "20-year power sales agreement with an affiliate of Invenergy Wind, LLC for 135 MW to 150 MW of output from a newly-proposed wind farm to be located near Judith Gap, Montana" at a price of approximately \$32/MWh.³⁴ This evidence supports a conclusion that there were no barriers to entry in this time period.

³¹ Order No. 697, FERC Stats. & Regs. 31,252 at P 122 ("absent entry barriers, long-term capacity markets are inherently competitive because new market entrants can build alternative generating supply"); *Kansas City Power and Light Co.*, 67 FERC ¶ 61,183 at 61,553 (1994) (over the long term "the prospect of entry by other sellers will check the seller's ability to sustain monopoly prices").

³² PPL Companies April 15, 2005 filing, Exhibit_(SEL-4) Bid Elimination Memo at 2-3. The independent consultant recommended five other bids for elimination from a "price perspective". The reason given for eliminating those bids was the fact that there were other similar bids in terms of start date and resource type that offered more competitive prices.

³³ PPL Companies April 15, 2005 filing, Exhibit_(MDT-RFP-23), Shortlist filed by NorthWestern Energy on Feb. 7, 2005 in Montana Public Service Commission Docket No. D2005.2.14.

³⁴ PPL Companies May 23, 2005 Answer to NorthWestern Corporation at 10. We also note that on July 5, 2006, NorthWestern stated that part of its resource procurement plan was to "take [] advantage of ...potential new generation sources." See page 1 of Attachment to PPL Companies, June 11, 2007 supplement.

30. Regarding an evaluation of PPL Companies' market power in short-term markets, as noted above, the Commission found in the May 18 Order that, based on an analysis of the record evidence, PPL Companies had rebutted the presumption of generation market power.³⁵ In particular, the Commission found that PPL Companies' DPT indicated that the market shares using the available economic capacity measure are below 20 percent in 7 out of 10 season/load periods and are only slightly above 20 percent during three off-peak periods, with the highest market share at only 25 percent.³⁶ The HHIs are all below the 2,500 threshold (the lowest being 903 in winter super-peak and the highest being 1,317 in shoulder off-peak). Further, PPL Companies are not pivotal in any season/load period. At the same time, in the economic capacity measure, while PPL Companies' market shares are above 20 percent in 5 periods (but do not exceed 27 percent), the HHIs remain below 2,500 and PPL Companies are not a pivotal supplier in any season/load periods.

31. However, the Commission's examination of PPL Companies' generation market power did not end with the DPT analysis. In response to protesters' arguments regarding the lack of alternative suppliers to serve native load in the NorthWestern control area and the failure of the PPL Companies' DPT analysis to address whether PPL Companies have market power over the supply of long-term firm wholesale power delivery beginning in July 2007, the Commission considered, among other things, the results of a 2004 RFP conducted by NorthWestern. After examining this evidence, including an analysis of the long-term bids, the Commission concluded that the results of the RFP had not been shown to be indicative of market power on the part of the PPL Companies because, among other things, the prices PPL Companies bid in the RFP were generally within the range of other bidders and NorthWestern appeared to have numerous other supply alternatives to PPL Companies. In particular, in the May 18 Order, the Commission noted that information on the record indicates that 44 proposals were submitted in response to the RFP. Nine of these 44 proposals were for intermediate-term products and 35 were for long-term products. Ten of the 35 long-term bids were eliminated because they were non-conforming or non-competitive. At least eight proposals from different bidders with bids ranging from 85 MW to 300 MW were short-listed. The bids generally ranged in price from \$40 to \$70 per MWh and PPL Companies stated that its bids were within the \$40-\$50 per MWh range. In addition, the RFP information and workpapers

³⁵ May 18 Order, 115 FERC ¶ 61,204 at P 41.

³⁶ Under the available economic capacity measure during the winter off-peak, when PPL Companies have their largest market share of 25 percent, total available economic capacity to compete in the NorthWestern control area was 2,127 MW and PPL Companies' share of that was 524 MW.

submitted by PPL Companies further indicate that NorthWestern was able to select a varied portfolio of delivered power (wind, dispatchable, base-load and non-unit contingent offers) and was able to create a short-list of eight entities including at least two bidders other than PPL Companies offering base-load resources. In response to MCC and Montana Commission claims that many of the RFP bids were not credible or competitive, we note that NorthWestern stated that 83 percent of portfolios reviewed “beat” the PPL Companies’ full requirement bid.³⁷

32. Accordingly, we disagree with the MCC and Montana Commission claims on rehearing that the Commission ignored evidence purportedly suggesting that long-term firm markets were not competitive. As demonstrated above, the Commission did analyze the data submitted regarding the RFP and found that it supported, rather than undermined, the conclusion that PPL Montana does not have market power.

33. In addition to the foregoing evidence, a review of EQR data filed with the Commission by all jurisdictional sellers indicates that PPL Companies is one of many suppliers into the NorthWestern control area. Specifically, EQR data indicates that in 2004 through 2005 over 18 entities besides PPL Companies³⁸ sold in the NorthWestern control area and that five of those entities made long-term sales, further supporting the Commission’s independent finding that PPL Companies does not have market power in generation. In sum, all of the foregoing evidence supports the conclusion that PPL Montana does not have market power.

iii. Treatment of Evidence Was Not Arbitrary and Capricious

a. PPL Companies’ and Protestors’ Attachment A Analysis

34. MCC and Montana Commission argue that it was arbitrary and capricious for the Commission to rely on PPL Companies’ analysis instead of the analysis presented by MCC. MCC and Montana Commission state that, throughout the order, the Commission

³⁷ NorthWestern May 6, 2005 filing at 23.

³⁸ Those entities are Avista Energy, Inc., Avista Corporation, Calpine Energy Management, L.P., Calpine Energy Services, L.P., Cargill Power Markets, LLC, Idaho Power Company, Judith Gap Energy LLC, Minnesota Power, Montana –Dakota Utilities Co., NorthWestern Energy, PacifiCorp, Powerex Corp., Public Service Company of Colorado, Puget Sound Energy, Inc., Rainbow Energy Marketing Corporation, Sempra Energy Trading Corp., Southern California Edison Company, Split Rock Energy LLC., The Clark Fork and Blackfoot, L.L.C., and Thompson River Co-Gen, LLC.

states that it is relying on PPL Companies' analysis. MCC and Montana Commission argue that the reliance on PPL Companies' analysis is arbitrary and capricious because MCC and Montana Commission demonstrated that PPL Companies' analysis did not present an accurate view of the relevant market in the NorthWestern control area.³⁹ MCC and Montana Commission state that the Commission did not consider MCC's analysis in reaching its decision. MCC and Montana Commission state that all but one of the Commission's explanations respond to NorthWestern's analysis. MCC and Montana Commission argue that, for example, the Commission failed to address MCC's demonstration in its "Attachment A Analysis"⁴⁰ that the allegedly available capacity to be imported is not in fact available.

35. Contrary to MCC and Montana Commission's assertion, the Commission has considered all protestors' arguments and supporting documents in evaluating PPL Companies' market power. First, in the May 18 Order the Commission found MCC's analysis to be flawed because it improperly calculated simultaneous transmission import limits.⁴¹ The Commission reviewed MCC's "Attachment A Analysis" and was not persuaded by its arguments primarily because the 2004 and 2007 DPT in MCC's Attachment A Analysis used improper simultaneous transmission import limits that ignore existing transmission reservations that competitors may use to import generation capacity.

36. Second, the Commission also found that Tables 3 and 4 of MCC's Exhibit (JW-2) of the Attachment A Analysis were not reliable due to the use of projected data for the

³⁹ The other errors that MCC alleges in PPL Companies' DPT analysis are: (1) an excessive deduction of capacity that PPL Companies claims was associated with native load commitments; (2) improper inclusion of the Colstrip plant as competitive market supply (since MCC claims that the Colstrip plant is reserved for the out-of-state native load obligations of load serving utilities that own this capacity); (3) overstatement of import capability; and (4) downrating adjustments in reporting projected hydroelectric generating capacity that PPL Companies own and operate in the market. MCC states that the downrating adjustments are appropriate for 2004, but are unreasonable on a projected basis.

⁴⁰ "Attachment A Analysis" filed under seal with MCC's January 6, January 11, and February 26, 2006.

⁴¹ Errors in calculating the extent to which competing imports can physically access the market are significant since they can greatly skew the study results.

year 2007. As noted above, the Commission requires the use of unadjusted historical data for the DPT analysis because historical data are more objective, readily available, and less subject to manipulation than future projections.⁴²

37. Third, contrary to MCC's claim that the Commission ignored its Attachment A Analysis because it was not directly referenced in the May 18 Order, in fact the Commission did consider the Attachment A Analysis (including the protected materials) in addressing NorthWestern's similar arguments about the availability of resources to be imported. Specifically, the Commission addressed MCC and Montana Commission's argument raised in its Attachment A Analysis that not all of the generating capacity that PPL Companies treat as available to be imported into the NorthWestern control area is in fact available.⁴³ In response to these arguments, the Commission stated that even if it were to accept all of NorthWestern's corrections to PPL Companies' analysis, the DPT results do not, on balance, support protestors' contention that PPL Companies have the ability to exercise market power.⁴⁴ Those corrections include accounting for PPL Companies' alleged incorrect assumption in calculating the available economic capacity that could be imported to the NorthWestern control area as argued by MCC, Montana Commission and NorthWestern. MCC argued in its Attachment A Analysis that such capacity was committed to loads and long-term contracts. We note that the suppliers in neighboring markets that MCC identified as unavailable to compete in the Northwestern market are the same suppliers that NorthWestern identified as unavailable. The Commission concluded in the May 18 Order that the evidence shows that PPL Companies do not fail the Commission's market power test even assuming the unavailability of these competing generators.⁴⁵ Thus, although the Commission did not specifically mention in the May 18 Order that MCC had raised this argument, the Commission nevertheless addressed it in its response to the same argument raised by NorthWestern, and we here directly respond to MCC's claim.

⁴² May 18 Order, 115 FERC ¶ 61,204 at P 63; Order No. 667, FERC Stats. & Regs. 31,252 at P 298-99. *See also Southern Companies Energy Mktg.*, 119 FERC ¶ 61,301 at P 8-11 (2007) (rejecting seller's proposal to use forward-looking data to perform the DPT).

⁴³ May 18 Order, 115 FERC ¶ 61,204 at P 53-4.

⁴⁴ *Id.* at P 55.

⁴⁵ *Id.* at P 53-4.

38. Finally, we note that earlier in this proceeding the Commission accommodated MCC's request for additional time and access to PPL Companies' workpapers, including access to the software program used by PPL Companies, in order for MCC to be able to supplement its Attachment A Analysis. The Commission accommodated MCC's request by suspending the DPT comment period and later extending it to allow for MCC to supplement its results after gaining access to PPL Companies' workpapers.⁴⁶ Thus, the Commission clearly accommodated MCC's efforts to develop its case in this proceeding. Despite this opportunity, in its various filings after gaining access to the requested workpapers, MCC neither provided new calculations nor did it further support its study results based on its newly-obtained access to PPL Companies' workpapers.

39. In summary, MCC and Montana Commission do not provide any new arguments on rehearing to warrant a reversal of the Commission's decision. Therefore, the Commission denies rehearing in this regard.

b. RFP Results

40. MCC and Montana Commission state that it was arbitrary and capricious for the Commission to rely upon incomplete data regarding the results of NorthWestern's RFP because the Commission did not have the details of the confidential bids or the bids themselves from the NorthWestern RFP before it. They submit that the Commission's determination that NorthWestern has reasonable alternatives to purchasing from PPL Companies is unsupported and unreasonable. MCC and Montana Commission contend that the Commission saw evidence of the quantity of bids, but not the quality. They submit that "there is no way to analyze the responses to the RFP other than the knowledge that NorthWestern found PPL Companies' (and most other) proposals unacceptable."⁴⁷ MCC and Montana Commission argue that if much of the power bid for sale to NorthWestern from Montana capacity comes from PPL Companies, this does not prove that there is a competitive power market in Montana. Furthermore, MCC and Montana Commission state that if bids in the RFP require NorthWestern to enter into a long-term contract to purchase power in order to support the financing of a new plant, whose construction can be delayed or blocked by PPL Companies, this likewise does not demonstrate a competitive market. At best, MCC and Montana Commission argue, any

⁴⁶ *Id.* at P 15 n26.

⁴⁷ MCC and Montana Commission Request for Rehearing at 18. We note that we cannot find a statement in the record from NorthWestern on this point and MCC and Montana Commission do not further elaborate on this statement.

bids that involved a new generation plant can indicate the potential for market entry, but not existing available capacity. Given the time required to build a new baseload plant, MCC and Montana Commission state that the existence of potential market entrants does not alleviate the problem of market power.

41. As an initial matter, we note that under the policy adopted in the April 14 Order (and recently reaffirmed in Order No. 697), all applicants and intervenors can, in addition to the standard studies, also present alternative evidence (*e.g.*, actual historical sales data) to show whether or not the applicant has generation market power.⁴⁸ After intervenors initially alleged that the Northwestern RFP supported their claims that the PPL Companies had market power, the PPL Companies submitted detailed information and workpapers concerning this RFP to rebut claims that the RFP evidenced a lack of supply alternatives to PPL Companies. The Commission has thoroughly examined the arguments and evidence provided by both sides on this issue, and concludes that, contrary to intervenor claims, NorthWestern had numerous competitive supply alternatives besides PPL Companies (for both long-term and short-term supply).

42. MCC and Montana Commission claim, however, that the Commission did not have sufficient information about the bids from the RFP to determine that NorthWestern had reasonable alternatives to purchasing from PPL Companies. We find this argument unpersuasive. As a general matter, the Commission only considers the evidence that is submitted into the record. As explained above, we did consider all record evidence regarding the RFP (both confidential and public) and found it corroborated, rather than undermined, the DPT results. If the MCC and Montana Commission believed that other RFP evidence should have been considered, they should have submitted that evidence into the record. Under our precedents, PPL Montana satisfied its filing obligations and its burden of proof by showing that, under the DPT analysis, it did not have market power. If intervenors believed that other evidence undercut that conclusion, the burden was on them, not PPL Montana, to supply that evidence.

43. Furthermore, and as noted above, there was substantial data on the RFP that was submitted into the record and considered by the Commission. The information and workpapers in this record on the RFP indicate NorthWestern received 44 bids in response to its RFP, 35 of which were for long-term products, and 25 of these were deemed by

⁴⁸ The other evidence we will consider is historical sales and/or access to transmission to move supplies within, out of, and into a control area market. *See* April 14 Order, 107 FERC ¶ 61,018 at P 102; Order No. 697, FERC Stats. & Regs. 31,252 at P 276.

NorthWestern to be both conforming and competitive. Eight of these were short-listed by NorthWestern, including at least two bidders other than PPL Companies offering base-load resources. Indeed, the evidence shows that NorthWestern not only received a large *number* of credible bids, but also that it was able to select from a *varied portfolio* of delivered power from wind, dispatchable, baseload and non-unit contingent resources. NorthWestern's statement that 83 percent of the portfolios reviewed "beat" the PPL Companies' full requirements bid is further evidence that NorthWestern not only had a large number of bids, but also numerous *credible* bids, from suppliers other than PPL Companies in response to its RFP. These facts clearly support PPL Companies' claim that the RFP results show that NorthWestern had numerous credible alternatives to PPL Companies and that the PPL Companies do not have market power in the Northwestern control area.⁴⁹

44. We also reject MCC and Montana Commission's argument concerning alleged barriers to entry. These parties claim that attempts to construct new plants "can be delayed or blocked" by PPL Companies, and that "[a]ny bids that involve new plant, if accepted, would face regulatory and other constraints and would have almost certainly been subject to [PPL Companies] efforts to impede construction."⁵⁰ An affidavit filed by these parties states that there have been several instances where PPL Companies have allegedly "mounted major opposition and has attempted to derail the proposed new projects in proceedings before the Montana Public Service Commission . . . [and that in doing so PPL Companies] has attempted to develop various procedural roadblocks to delay or entirely frustrate new entry."⁵¹ First, we find these claims to be unsubstantiated since MCC and the Montana Commission provide no evidence that these actions took place, or how PPL Companies improperly participated in the state proceedings. Second, it is undeniably PPL Companies' right to express an opinion in a public proceeding before a state agency. But more importantly, we believe that the Montana Commission is responsible for ensuring the integrity of its own processes, including preventing parties from manipulating those processes by developing "procedural roadblocks" to the detriment of customers. Regarding the siting of new generation in the state, the Montana agencies are responsible for placing protections in place to ensure that the state siting authority review process cannot be manipulated by parties who would seek to use that process to erect barriers to entry. Finally, we note that PPL Companies are not the

⁴⁹ May 18 Order, 115 FERC ¶ 61,204 at P 60 (*citing* NorthWestern May 6, 2005 answer at 23).

⁵⁰ MCC and Montana Commission Request for Rehearing at 18 n 2.

⁵¹ *Id.*, Fourth Wilson Aff. at ¶ 6 and n. 2.

transmission provider and, therefore, are not in a position to erect barriers to entry through actions related to interconnection of new generators or access to transmission service.

c. Committed Capacity

45. MCC and Montana Commission argue that it was arbitrary and capricious for the Commission to count generating capacity owned by others but committed elsewhere as capacity available to compete with PPL Companies. MCC and Montana Commission state that some potentially competitive capacity in the NorthWestern control area is legally or contractually committed to serve other customers and, thus, is not available to compete with PPL Companies. MCC and Montana Commission state that the Commission failed to address the issue that PPL Companies included this capacity as competitive despite its commitment to other markets. MCC and Montana Commission claim that, although PPL Companies made some adjustments and purportedly included only the capacity that is available to compete, it failed to recognize that those sellers with such capacity may not choose to release the capacity to the Montana markets that is committed to otherwise serve native load elsewhere. MCC and Montana Commission argue that PPL Companies made no study of real availability on a long-term firm basis of generation owned by others that could be deemed available. MCC and Montana Commission state that the Commission's failure to address this issue was arbitrary and capricious and that allowing PPL Companies to treat committed capacity as uncommitted was error.

46. MCC claimed that PPL Companies wrongly included, as competitive market supply, the generating capacity from the Colstrip Power Plant (Colstrip Plant) that MCC claims is reserved for the out-of-state native load obligations of the load-serving utilities that own this capacity.⁵² We acknowledge that the May 18 Order did not explain in detail PPL Companies' treatment of the generating capacity from the Colstrip Plant that is reserved for the native load obligations of load-serving entities that own this capacity. We therefore clarify the issue as follows. The PPL Companies excluded from its DPT analysis 1,324 MW of the total 2,094 MW of the Colstrip Plant.⁵³ In calculating capacity

⁵² *Id.*

⁵³ When PPL Companies submitted their indicative screens to the Commission as part of their updated market power analysis, they treated all non-affiliate capacity from the Colstrip Plant and capacity from Colstrip that is dynamically scheduled as uncommitted competing supply in the NorthWestern control area. The Commission rejected this approach in its September 1 Order acting on PPL Companies' indicative

available in the NorthWestern control area, PPL Companies excluded certain portions of the Colstrip Plant that are owned by the joint owners other than PPL Companies⁵⁴ and are dynamically scheduled by them to external control areas and which was committed to serve primarily out-of-state native load obligations. PPL Companies only included as being in the NorthWestern control area the portion of the Colstrip Plant owned by PPL Companies, the portion owned by NorthWestern but contracted to Duke, and uncommitted PacifiCorp capacity.⁵⁵ As a result, in terms of the capacity of the Colstrip Plant that is committed to serve native load elsewhere, contrary to the argument of MCC and Montana Commission on rehearing, PPL Companies did not count that as capacity available to compete in the NorthWestern control area. Thus, the treatment of the Colstrip generation sought by MCC and Montana Commission, *i.e.* exclusion of the 1,324 MW of the Colstrip Plant from PPL Companies' DPT analysis, is already reflected in the PPL Companies' study relied on by this Commission.

d. Deductions of Expiring Contracts

47. MCC and Montana Commission state that it was arbitrary and capricious for the Commission to allow deductions from PPL Companies' uncommitted capacity for capacity associated with contracts that are expiring. Specifically, they state that in determining the applicant's generation market power presence, the Commission should not have permitted PPL Companies to deduct generation associated with its long-term contracts with NorthWestern that expired in June 2007 and its contracts with retail industrial customers that expire in the same time period. MCC and Montana Commission state that the Commission has permitted such deductions principally on the circular ground that "'current policy' permits deductions of any 'capacity that is tied to any long-term firm commitments to third parties.'"⁵⁶ MCC and Montana Commission state that, to

screens. 112 FERC ¶ 61,237 at P 31-33. As noted above, for purposes of their DPT analysis, PPL Companies did not include such capacity as uncommitted competing supply in the NorthWestern control area.

⁵⁴ As the May 18 Order indicated, the Colstrip Plant is jointly owned by PPL Montana, Puget Sound Energy, Avista Corp., Portland General Electric Company, NorthWestern and PacifiCorp. May 18 Order, 115 FERC ¶ 61,204 at n. 24.

⁵⁵ PPL Companies' February 1, 2006 filing included revised DPT results that do not include Puget Sound Energy, Inc.'s (Puget) 25 MW as available in the NorthWestern control area (Revised Exhibit 7A).

⁵⁶ MCC and Montana Commission Request for Rehearing at 20 (*citing* May 18 Order, 115 FERC ¶ 61,204 at P 46, 48).

the extent that this deduction may be deemed allowed under Commission policy, Commission policy would, in this case, conflict with the statutory mandate to ensure that all rates are just and reasonable.⁵⁷

48. We deny MCC and Montana Commission's request for rehearing on this issue. As an initial matter, we note that the determination to allow PPL Companies to deduct the capacity tied to its long-term contracts with NorthWestern and with industrial retail customers (and not to allow the use of projected data to take into account the expiration of long-term contracts) is consistent with the Commission's general policy concerning the calculation of uncommitted capacity for purposes of the DPT analysis. Further, the Commission recently affirmed our treatment of this issue in the market-based rate Final Rule in Order No. 697.

49. It has long been the Commission's policy to allow the deduction of long-term contracts when computing sellers' uncommitted capacity available to compete in the market.⁵⁸ Generation that is tied up under long-term commitments is not generally available to compete in wholesale markets. Thus, over the years, the Commission has rejected suggestions to treat capacity that is tied up in a long-term contract of one year or greater as uncommitted and hence, available to compete in the market.

50. MCC and Montana Commission seek to distinguish this precedent by arguing that, in this case, the long-term contracts are "expiring" in 2007. But all long-term contracts expire at some point. This argument therefore is no different than their contention, addressed in detail above, that the Commission should have measured market shares in 2007, rather than using 2004 historical data. We explained above why this argument fails. It would not help customers, or otherwise be administratively feasible, to allow applicants or intervenors to pick and choose the years for which market power studies are calculated. Otherwise, each would no doubt choose the year that best suits its objectives, as well as the assumptions it found most favorable. In sum, there is nothing arbitrary in our use of a consistent, unadjusted historical year data for determining whether a company has market power.

51. The Commission has adopted this approach because historical data are more objective, readily available, and less subject to manipulation by applicants than future

⁵⁷ MCC and Montana Commission Request for Rehearing at 20-22.

⁵⁸ April 14 Order, 107 FERC ¶ 61,018 at P 95; July 8 Order, 108 FERC ¶ 61,026 at P 67.

projections. If the Commission were to allow applicants to submit studies based on their future projections, then applicants would be able to selectively “cherry pick” those projected changes that benefited the applicant in obtaining market-based rate authorization while ignoring other equally likely future changes that would undermine the applicant’s chances for obtaining such authorization. Indeed, if the Commission were to here consider the intervenor studies reflecting future, projected studies, it would necessarily have to consider the PPL Companies’ future, projected studies the Commission has thus far rejected and which PPL Companies claim make an even stronger case that they do not possess generation market power.

52. The Commission therefore found that PPL Companies correctly deducted the 450 MW long-term contract with NorthWestern from their available economic capacity, and in finding that PPL Companies’ deduction of 237-41 MW (depending on season) for long-term firm sales by PPL Companies’ affiliate, PPL EnergyPlus, to industrial customers under 13 contracts from its available economic capacity is appropriate.⁵⁹ Based on the Commission’s review of the termination clauses of the contracts and their delivery terms, all are long-term contracts. Thus, the Commission found that PPL Companies correctly deducted capacity that is tied to these long-term firm commitment contracts, and that it properly based its study on the most recent unadjusted 12 months’ historical data.⁶⁰

53. Moreover, even if, contrary to our precedents, the Commission had accepted the selective adjustment proffered by the Montana parties, it would not have changed the result. In the May 18 Order, the Commission went on to examine the impact that counting such capacity as uncommitted capacity would have on PPL Companies’ DPT results. In this regard, the Commission examined the adjusted DPT that NorthWestern had submitted, which included adjustments to the available economic capacity measure to account for 450 MW from expiring contracts as well as the capacity associated with PPL EnergyPlus’s contracts with industrial and commercial end-users in Montana, and other minor adjustments.⁶¹ Significantly, even when one makes adjustments to disallow these

⁵⁹ May 18 Order, 115 FERC ¶ 61,204 at P 48 *citing* 18 C.F.R. § 33.3 (c)(i)(A) (“Prior to applying the delivered price test, the generating capacity meeting this definition must be adjusted by subtracting capacity committed under long-term firm sales contracts and adding capacity acquired under long-term firm purchase contracts.”).

⁶⁰ *Id.* at P 45-48.

⁶¹ NorthWestern’s DPT also included adjustments to exclude capacity associated with wholesale sales to investor-owned entities in the NorthWestern control area that may

(continued)

deductions of expiring contracts by PPL Companies, NorthWestern's DPT does not support the argument that PPL Companies have the ability to exercise market power.⁶²

54. A similar result is obtained if one revises the PPL Companies' DPT study to reflect the MCC and Montana Commission's adjustments to account for contracts expiring on or near the horizon. Namely, even when one adjusts the PPL Companies' DPT study to attribute to the applicant its generation associated with the NorthWestern and retail industrial customer long-term contracts that expire before the end of 2007, the results show that PPL Companies are not a pivotal supplier in any season/load condition (under both the economic capacity and available economic capacity measures); the market concentration measures in each season/load condition (and for both the economic capacity and available economic capacity measures) are well below the 2,500 HHI threshold that raises concerns; and the market shares, though somewhat elevated, are no higher than 33 percent in any season/load condition for the available economic capacity measure.⁶³ Giving reasonable weight and consideration to each of these measures, we believe that, on balance, the results show that PPL Companies do not possess market

be "committed" to load, and therefore not properly included in the available economic capacity measure, which they argue causes a 1 to 2 percent increase in PPL Companies market shares. NorthWestern's DPT also excluded from available capacity in the NorthWestern control area portions of Colstrip capacity which they argued should have been excluded with the rest of Colstrip capacity that PPL Companies did exclude from the available capacity in the NorthWestern control area. Those capacities are: PacifiCorp's 80 MW, which PPL Companies had counted as available on the basis that PacifiCorp had insufficient firm rights to move all of its Colstrip share out of the control area and Puget's 25 MW capacity from a contract entered into by NorthWestern from its 20 percent share of Colstrip Unit No. 4.

⁶² *Id.* at P 52.

⁶³ Although a 20 percent market share constitutes a failure under the Commission's preliminary screens (and indeed is one of the factors that led the Commission earlier in this proceeding to initiate a section 206 investigation to gather more evidence), that is not the case in the Commission's second stage review involving DPT studies. Rather, in the second stage review, instead of a bright line test as to whether a seller has market power, the Commission considers all the evidence presented (including, but not limited to, market share, market concentration and whether the seller is a pivotal supplier) and balances this evidence to decide whether the seller has market power.

power in the NorthWestern market. This is particularly so since this scenario is very conservative in its treatment of expiring contracts.

e. **Native Load Deductions**

55. MCC and Montana Commission state that it was arbitrary and capricious for the Commission to allow PPL Companies to make “native load deductions” when PPL Companies do not have long-term native load obligations. MCC and Montana Commission argue that the contracts that the Commission allowed PPL Companies to deduct from their uncommitted capacity serve NorthWestern’s native load and not PPL Companies’ native load. On this basis, they argue that PPL Companies’ deductions are entirely inappropriate here. MCC and Montana Commission also state that in testing whether PPL Companies have market power, it is irrational for the Commission to allow PPL Companies to exclude from their available generation the capacity that is necessary to serve the contested load. Thus, MCC and Montana Commission state that the Commission uses false measures of market power that show, as a matter of tautology, that PPL Companies do not possess any market power. Furthermore, MCC and Montana Commission argue that the Commission previously recognized the inappropriateness of the industrial deductions, but allowed them without justification in the May 18 Order.⁶⁴

56. MCC and Montana Commission’s arguments in this regard concern the same issue as that discussed in the preceding section: whether the Commission erred in allowing PPL Companies to reduce their uncommitted capacity by the amount of capacity committed under long-term contracts. We fully address this issue above, where we conclude that the determination to allow deductions of capacity that is tied to any long-term firm commitments was fully consistent with Commission precedent. With regard to MCC and the Montana Commission’s claim that PPL Companies was allowed to make “native load deductions” when PPL Companies do not have long-term native load obligations, this is simply not the case. The capacity deductions were allowed to PPL Companies because it was tied to a long-term contract and it was appropriate to deduct long-term commitments when determining the amount of capacity available to compete.

57. Moreover, MCC and Montana Commission’s argument that the Commission previously recognized the inappropriateness of the deductions for the contracts with retail industrial customers, but allowed them without justification in the May 18 Order, is in error. In the Commission’s September 1 Order acting on PPL Companies’ indicative screens, the Commission stated that the applicant had not sufficiently demonstrated that

⁶⁴ *Citing* September 1 Order, 112 FERC ¶ 61,237 at P 34-5.

PPL Companies have a native load (or long-term firm) contractual commitment to their affiliated power marketer, PPL EnergyPlus. In that earlier proceeding, PPL Companies claimed that this capacity was under a long-term contract with PPL EnergyPlus, pursuant to which PPL EnergyPlus meets a 230-41 MW retail load obligation for 13 larger retail electricity consumers in Montana. The Commission noted in the September 1 Order that PPL Companies were silent as to the nature or term of this contract with the large retail consumers and had not submitted this contract for the record or provided additional data to support their claim that the entire 230-41 MW is, in fact, committed and not available for wholesale sales. Accordingly, the Commission stated that it could not conclude at that time that such contract satisfied the April 14 and July 8 Orders with respect to long-term firm sales deductions from PPL Companies' (or PPL Companies' affiliates) installed capacity. However, when PPL Companies subsequently filed their DPT analysis and again deducted this capacity from their uncommitted capacity, they provided the contracts for Commission review. In the May 18 Order, the Commission explained that, based on its review of the contracts, it determined that all are long-term contracts and that PPL Companies correctly deducted capacity that is tied to those contracts.⁶⁵

f. PPL Companies' Deductions from Available Generation Capacity

58. MCC and Montana Commission argue that it was arbitrary and capricious for the Commission to allow PPL Companies to deduct generating capacity under their operational control from their available capacity. MCC and Montana Commission state that it is impermissible for a seller to deduct generation under a long-term contract from its available capacity where the applicant retains operational control over the capacity. They submit that PPL Companies, not NorthWestern, control the generation that they sell to NorthWestern and the industrial customers and that they will control the generation after the contracts expire. To illustrate this point, MCC and Montana Commission state that, had Montana Power maintained an integrated utility, it could not maintain that it did not have market power in the Montana market. They contend that the sale of that generation to PPL Companies changes nothing and that PPL Companies should not be able to claim a lack of market power by using "sleight of hand" to ignore a large portion of its generation in analyzing its market power.

59. MCC and Montana Commission's argument in this regard is misplaced. MCC and Montana Commission reference Commission precedent providing that uncommitted capacity is determined by adding the total capacity of generation owned or controlled

⁶⁵ May 18 Order, 115 FERC ¶ 61,204 at P 48.

through contract and firm purchases less, among other things, long-term firm requirements sales that are specifically tied to generation owned or controlled by the seller and that assign operational control of such capacity to the buyer. However, they misinterpret this precedent to the extent that they suggest that a seller with a long-term firm requirements contract somehow retains operational control of the capacity under contract. To the contrary, the rationale for allowing a seller to count such capacity as committed and therefore to deduct it from its uncommitted capacity generation is that the seller is committed to providing that capacity to the buyer. In other words, for purposes of calculating PPL Companies' uncommitted capacity, because PPL Companies is contractually obligated to provide that capacity under a long-term firm contract, such capacity is not considered to be available for PPL Companies to sell elsewhere.

60. MCC and Montana Commission also err in their claim that had Montana Power maintained an integrated utility then it would have a more difficult time retaining market-based rate authority, presumably because it would not be able to deduct the generation associated with these two long-term contracts. MCC and Montana Commission overlook the critical point that, if a vertically-integrated Montana Power owned the same generation used to supply these two long-term commitments and used power from that generation to meet its native load or operating reserve obligations (which NorthWestern is doing with the power it is procuring from PPL Companies), then Montana Power would properly be able to deduct this generation because it was committed to serving native load. Under either scenario there is a sound reason for allowing the applicant to deduct this generation from its uncommitted capacity calculation – in the one case because it has been shown to be committed to serving native load, and in the other case because it is committed under long-term contracts.

g. Burden of Proof

61. MCC and Montana Commission argue that the Commission's dismissal of the NorthWestern DPT on the ground that it does not necessarily support the contention that PPL Companies have market power improperly places the burden upon protestors to prove that PPL Companies have market power rather than properly placing the burden on PPL Companies as the applicant seeking continued market-based rate authority to show that they do not have market power. MCC and Montana Commission state that PPL Companies' failure of the initial screens created a rebuttable presumption of market power and that the burden is on PPL Companies to rebut that presumption, not on protestors to confirm it.⁶⁶

⁶⁶ MCC and Montana Commission Request for Rehearing at 25-6.

62. The Commission agrees with MCC and Montana Commission that the burden of proof falls upon PPL Companies to rebut the presumption of market power. As MCC and Montana Commission point out, PPL Companies' failure of the indicative screens created a rebuttable presumption of market power. However, the Commission finds that PPL Companies' have met that burden and rebutted the presumption of market power.⁶⁷

63. The Commission has evaluated the DPT analyses submitted by PPL Companies, NorthWestern and MCC, and the other evidence developed in this record. After reviewing the information in the record that was developed consistent with our precedent, we conclude that this evidence (particularly PPL Companies' DPT analysis and the RFP) shows that PPL Companies have rebutted the presumption of market power. Thus, consistent with Commission precedent, the burden of proof to rebut the presumption of market power was on PPL Companies, and the Commission has concluded that PPL Companies have rebutted the presumption of market power. At the same time, although protestors proposed adjusted DPT analyses that they contended supported a finding of market power, the Commission found that those adjusted analyses were not consistent with Commission precedent and are not otherwise persuasive for the reasons discussed above. Moreover, as noted above, the Commission concluded that, even if it did consider the adjustments to DPT analysis proposed by NorthWestern, the results of NorthWestern's DPT did not support a finding of market power. As a result, we deny MCC and Montana Commission's request for rehearing on this issue.

h. Simultaneous Transmission Import Limit

64. MCC and Montana Commission argue that by improperly ignoring MCC's evidence on the subject of simultaneous transmission import limits, the Commission erroneously concluded that because "PPL Companies have used simultaneous transmission import limits that take account of transmission constraints as calculated by the [Western Electricity Coordinating Council (WECC)]," PPL Companies' simultaneous transmission import limit study is a more appropriate measure of transmission import capability than is NorthWestern's Open Access Same Time Information System (OASIS). MCC and Montana Commission state that where, as here, the product at issue is long-term firm capacity to serve residential consumers, one cannot rely on capacity availability from plants whose outputs are committed to others, nor can one rely on hypothetical transmission availability. MCC and Montana Commission state that PPL Companies assume greater transmission import capability than was shown by

⁶⁷ May 18 Order, 115 FERC ¶ 61,204 at P 1, 30-31, 41, and 65.

NorthWestern's transmission OASIS, and that PPL Companies' studies ignored transmission constraints and limitations.

65. In particular, MCC and Montana Commission state that the Commission accepts PPL Companies' overstated transmission availability, which is based upon invalid assumptions for imports into the NorthWestern control area and which fails to recognize the lower total import capabilities that are now the operational limits as reflected on the control area operator's OASIS. MCC and Montana Commission argue that PPL Companies derive unrealistic transfer capability numbers by "failing to recognize actual transmission contingencies, constraints and existing capacity reservations (to meet cooperative, municipal and other utility native loads) in favor of a theoretical transmission import capability assuming [as PPL Companies do] that no constraints or reservations exist and that 'most of the generating resources in NorthWestern's control area were turned off,' [thereby creating] the false impression that there are nearly 1,000 MW of additional import capability available for competitive imports."⁶⁸

66. MCC and Montana Commission claim that the Commission accepts PPL Companies' reliance on import capability limits that are disfavored by the company on whose data it relies, that are contradicted by the OASIS and that have been previously rejected by the Commission.

67. Furthermore, MCC and Montana Commission claim that the Commission ignored the September 1 Order and failed to explain its departure from the analysis in the September 1 Order. MCC and Montana Commission's argument seems to refer to the discussion in the September 1 Order related to the PPL Companies' proposal to use the regional market of the Northwest Power Pool (NWPP) as the relevant geographic market instead of the NorthWestern control area. However, the Commission rejected PPL Companies' proposal to use the wider geographic market; PPL Companies' DPT appropriately used the NorthWestern control area as the relevant geographic market.

68. We deny rehearing for the reasons discussed below. We first explain why we use simultaneous transmission import study in our market power analysis. We then address MCC and Montana Commission's specific criticisms of such a study.

69. For the purpose of our generation market power analysis, the primary objective for performing a simultaneous transmission import limit study is to determine the applicant's control area transmission accessibility to first-tier suppliers who desire to serve the

⁶⁸ MCC and Montana Commission Request for Rehearing at 31.

demand/load in the applicant's control area. The Commission uses simultaneous transmission import limit studies to determine the amount of competing supplies that can reach the relevant control area given the physical transmission constraints. As stated in the April 14 Order, simultaneous transmission import capability provides a more realistic evaluation of transmission limitations in competitive markets than total transfer capability (TTC), and numerous commenters supported this type of study.⁶⁹ We recently affirmed the use of the simultaneous transmission import study in Order No. 697.⁷⁰

70. Consistent with this approach, the Commission found in the May 18 Order that PPL Companies had properly used simultaneous transmission import limits that take account of transmission constraints as calculated by the WECC, including transmission reliability margin, consistent with Appendix E of the April 14 Order.⁷¹

71. The Commission has accepted WECC Operating Transfer Capability path ratings as acceptable proxies for simultaneous transmission import limits.⁷² And contrary to MCC and Montana Commission's claims, the WECC Operating Transfer Capability ratings do take account of contingencies and transmission constraints.⁷³ Indeed, the Commission has required companies that use WECC Operating Transfer Capability ratings to account for path interdependencies and actual conditions that limited transmission capability below the Operating Transfer Capability limit.⁷⁴

72. The May 18 Order explained that the use of actual OASIS postings of Available Transfer Capability (ATC) as an alternative transmission import capability value significantly understates the import capability because the use of actual postings of ATC as a limit to what can be imported does not take into account existing transmission

⁶⁹ April 14 Order, 107 FERC ¶ 61,018 at P 77-84.

⁷⁰ Order No. 697, FERC Stats. & Regs. 31,252 at P 384.

⁷¹ PPL Companies' November 14, 2005 Workpapers, NWMT Import Capability Non-simultaneous transmission import limits.

⁷² *Pinnacle West Corp.*, 110 FERC ¶ 61,127 at P 10 (2005); *Puget Sound Energy, Inc.*, 111 FERC ¶ 61,020 at P 9-11 (2005). *See also* May 18 Order at P 56.

⁷³ *Id.*

⁷⁴ *Pinnacle West Capital Corp.*, 110 FERC ¶ 61,127 at P 8-10.

reservations that may be held by competitive suppliers or PPL Companies.⁷⁵ The simultaneous transmission import limit that the Commission defined in Appendix E of the April 14 order is not the same as ATC calculations, and the ATC values from the NorthWestern OASIS ignore firm reservations held by competitors that represent competing supply. Deducting these reservations from simultaneous transmission import limits distorts the study of the market by removing existing competitive supply from the market. The Commission will consider actual data in place of a simultaneous transmission import limit study, but the actual data must reflect full transmission capability. Transmission capability can be divided in four components for the purpose of market-based rate studies. These are: (1) ATC available for reservation by any party; (2) transmission reserved by the applicant; (3) transmission reserved by competitors; and (4) transmission set aside for reliability (Capacity Benefit Margin (CBM) and Transfer Reliability Margin (TRM)). The Commission studies all four of these components in order to obtain an accurate understanding of the actual, physical transmission capability in the relevant control area. Simultaneous transmission import limits are reduced by applicant's transmission reservations and reliability margins (TRM and CBM) before being allocated to competing supply for the market share screens and DPT analyses. ATC only represents one of the components, the transmission that is available for reservation, *i.e.*, the transmission that has not been reserved. The use of ATC does not provide a complete study of the market because it ignores the transmission purchased by competitors of PPL Companies, as well as grandfathered transmission contracts, or transmission dedicated to jointly-owned units, held by competitors of PPL.

73. We note that in their November 14, 2005 filing, PPL Companies provided documentation of their long-term contracts and described how these were modeled in the DPT, *i.e.*, that PPL Companies reduced the simultaneous transmission import limits by the amount contracted by PPL Companies. The Commission does not require applicants to deduct transmission reservations held by competitors from simultaneous transmission import limits because this unrealistically reduces the size of the market by ignoring competitive supply. In fact, in Order No. 697 the Commission clarified that simultaneous transmission import limits associated with competitors' transmission reservations should be allocated to the reservation holder when performing the market-based rate study.⁷⁶

74. It is unclear as to what MCC and Montana Commission argue by citing to two paragraphs from the September 1 Order related to the proposed use of the NWPP area as

⁷⁵ *Id.* at P 63.

⁷⁶ Order No. 697, FERC Stats. & Regs. 31,252 at P 369.

a relevant geographic market, a proposal that the Commission rejected.⁷⁷ MCC and Montana Commission's argument that the Commission did not explain its "departure from the analysis in the September 1 Order" in this regard is not clear, particularly given that the PPL Companies performed a DPT analysis for the default NorthWestern control area instead of the NWPP geographic area (the use of which as a relevant geographic market the Commission rejected).

75. In addition, contrary to MCC and Montana Commission's claim, the Commission did not reject NorthWestern's simultaneous transmission import limit study.⁷⁸ The Commission's May 18 Order stated that PPL Companies' DPT analysis for 2004 uses the simultaneous transmission import limits for the NorthWestern control area reported by NorthWestern in its market-based rate triennial review filing, as adjusted by PPL Companies.⁷⁹ The downward adjusted simultaneous transmission import limits used by PPL Companies in their DPT analysis are 1,344 MW for summer, 1,406 MW for winter and 1,342 MW for spring.⁸⁰ The Commission noted that NorthWestern's simultaneous transmission import limit study reported higher import capacity for all seasons. In particular, the simultaneous transmission import limits used by NorthWestern in its analysis are 1,400 MW for summer, 1,567 MW for winter and 1,500 MW for spring. PPL Companies' use of simultaneous transmission import limits that are less than NorthWestern's own study represents a conservative assumption that reduces the amount of competing supplies considered and increases PPL Montana's market share accordingly.

76. The simultaneous transmission import limits used by PPL Companies are different from the amount of ATC reflected on NorthWestern's OASIS, but as described above,

⁷⁷ The Commission stated in the September 1 Order: "Applicants have not demonstrated that, for purposes of the indicative screens analysis, the relevant geographic market should be the NWPP area for customers located in the NorthWestern control area. ...Applicants' analysis includes substantially more uncommitted generation capacity in NWPP than can be simultaneously imported into the NorthWestern control area" 112 FERC ¶ 61,237 at P 38.

⁷⁸ *NorthWestern Corp.*, 112 FERC ¶ 61,019 (2005).

⁷⁹ NorthWestern Corporation, Market Power Analysis filed under Docket No. ER03-329-006, December 14, 2005, Simultaneous Import Limitation Study.

⁸⁰ PPL Companies, November 14, 2005 Workpapers.

they are inherently different quantities, since ATC only reflects the amount of transmission capacity that has not been reserved. Thus, ATC does not reflect the total amount of transmission capacity that can be used to import capacity from first-tier markets.

77. The purpose underlying a simultaneous transmission import limit calculation is to determine how much generation can be physically imported from first-tier markets into the study area. Whereas ATC represents the amount of transmission capacity available above current reservations, the simultaneous transmission import limit represents the total amount of transmission capacity that is physically able to accommodate imports.

78. When competitive supply in the first-tier markets competes in the NorthWestern control area, it must purchase a transmission reservation into the control area. Thus, to accurately determine the amount of competitive supplies that can be imported into NorthWestern's control area both existing reservations plus ATC must be considered and this is accomplished by performing a simultaneous transmission import study. If the Commission ignored existing reservations in its market-based rate studies, it would artificially reduce the size of the market to generation inside the control area and unreserved ATC by not accounting for existing transmission reservations.

79. Thus, the Commission's market-based rate analysis considers the physical transmission capability (simultaneous transmission import limits) and the applicant's reservation of that capability, and the amount of uncommitted generation capacity the applicant has in first-tier markets. The simultaneous transmission import limit is first reduced by the applicant's reservation of that transmission capacity and then by the amount of uncommitted generation capacity the applicant has in first-tier markets. Remaining simultaneous transmission import limits is allocated to competing supply in first-tier areas according to their existing transmission reservations or by pro-rata allocation. For the reasons explained above, the Commission has found in this case, and clarified in Order No. 697, that the use of ATC as a proxy for simultaneous transmission import limits is overly restrictive and provides an incomplete picture of the market.

i. Projected Data

80. MCC and Montana Commission also argue that the Commission erroneously rejected protestors' reference to 2006 OASIS postings to derive simultaneous transmission import limits as using "projected data" and as failing "to take into account existing transmission reservations that may be held by the competitor suppliers or to the applicant." MCC and Montana Commission argue that the difficulty with the Commission's objection to the use of the projections is that future alternative availability of transmission for power supplies to displace PPL Companies' sales is what is being

measured. Moreover, MCC and Montana Commission state that the Commission proposes to allow the consideration of known and measurable changes, where justified in the Market-Based Rates Notice of Proposed Rulemaking.⁸¹ Therefore, MCC and Montana Commission argue that the Commission should allow the use of known and measurable changes in this case. MCC and Montana Commission further argue that the Commission makes no attempt to measure whether the speculative transmission to which it refers would be available to serve NorthWestern default load (on a long-term firm basis) and whether it can be matched to the speculative supply that it also posits would be available. MCC and Montana Commission therefore state that there is no justification for imposing on Montana's default customers massive rate increases on a mere unsupported speculation that transmission may be available.⁸²

81. We have thoroughly addressed above MCC and Montana Commission's arguments on the use of projected data. As noted above, in Order No. 697, the Commission abandoned the NOPR proposal to allow for known and measurable changes in the DPT analysis and instead affirmed the long-standing policy to rely on the most recent historical data rather than more speculative, projected data. Specifically, in Order No. 697 the Commission stated that it will continue to require the use of historical data for both the indicative screens and the DPT in market-based rate cases.⁸³ As explained in previous sections of this order, we disagree with MCC and Montana Commission that the point at issue is the availability of future long-term firm capacity to serve Montana's residential consumers. The question in this proceeding is whether PPL Companies have rebutted the presumption of market power in the control area operated by NorthWestern and satisfy the Commission's generation market power standard for the grant of market-based rate authority. Further, we address above MCC and Montana Commission's concerns as to price increases in Montana.

⁸¹ MCC and Montana Commission Request for Rehearing at 31 *citing Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 115 FERC ¶ 61,210 (2006) (Market-Based Rates NOPR).

⁸² MCC and Montana Commission Request for Rehearing at 33.

⁸³ Order No. 697, FERC Stats. & Regs. 31,252 at P 298.

j. Acceptance of Offer of Sales of Discounted Power

82. MCC and Montana Commission argue that PPL Companies' offer of mitigation by committing to voluntary long-term sales to load within the NorthWestern control area for 100 MW of discounted power does not alleviate PPL Companies' market power. MCC and Montana Commission state that both the timing of the offer of sale and the fact that PPL Companies' affiliate that sells to Montana industrial customers is not excluded from bidding could increase PPL Companies' monopoly power.⁸⁴ MCC and Montana Commission further state that sales to an affiliate would further concentrate PPL Companies' market power and would block NorthWestern from purchasing the capacity that is needed to sell to dependent default supply customers.

83. The May 18 Order determined that PPL Companies have successfully rebutted the presumption of market power. Therefore, PPL Companies' offer to commit to additional long-term sales at a "discounted" rate is beyond what the Commission would otherwise require. Accordingly, PPL Companies' offer is no more than a commitment to sell discounted power and no purpose would be served by turning down an unsolicited offer to commit to long-term sales of discounted power. Further, we disagree with MCC and Montana Commission's argument that such an offer of commitment to sell discounted power would increase PPL Companies' presence in the market. In conducting our market power analysis, the Commission considers all power owned or controlled by the applicant and its affiliates. A subsequent sale between two affiliates may raise affiliate abuse concerns, none of which have been raised in this proceeding, but does not fundamentally alter the amount of capacity attributed to the applicant for study purposes.

84. We disagree with MCC and Montana Commission's claim that PPL Companies' offer to make long-term sales to load within the NorthWestern control area will increase PPL Companies' alleged market power. PPL Companies has followed through on its commitment to sell up to 100 MW of firm power to purchasers that serve load in NorthWestern's control area under a standard form contract at a discounted price that is \$5/MWh less than a market index price (the Firm Dow Jones Mid-Columbia Index). In fact, although there was insufficient interest (even from NorthWestern) to fully subscribe the entire 100 MW offer for the period before June 2007, the full 100 MW has been committed by PPL Companies for delivery to retail customers during the July 2007 through December 2008 period.⁸⁵ We find no record evidence that an offer to sell

⁸⁴ MCC and Montana Commission Request for Rehearing at 35-6.

⁸⁵ PPL Companies, Letter Report, June 11, 2007 at 2.

additional power supplies for delivery to retail customers is harmful to customers – regardless of whether the power is sold to retail customers directly, or indirectly through a PPL Companies’ affiliate. Accordingly, MCC and Montana Commission have provided neither evidence nor a compelling argument to show how PPL Companies’ offer of additional supply to the market has enhanced its alleged market power or otherwise harmed customers.

k. Antitrust Concerns Were Appropriately Addressed

85. MCC and Montana Commission argue that the Commission did not consider antitrust policy in the May 18 Order. They assert that the Commission failed to consider PPL Companies’ market power and the effect that such market power would have on the competitive market for power in Montana. MCC and Montana Commission state that “protection of Montana’s consumers requires a reversal of [the May 18] Order and an order that PPL Companies sell to NorthWestern ... at cost (sic) rates.”⁸⁶

86. The May 18 Order evaluated the market power of PPL Montana in Montana and surrounding control areas. In particular, the Commission evaluated PPL Companies’ market power under the established precedent that takes into account an applicant’s DPT analysis, the relevant HHI numbers as well as other factors such as the result of a recent RFP that indicate the applicant does not possess market power. Analysis of market shares and market concentration have long been staples of market power analysis among the antitrust agencies, and indeed, the market concentration thresholds used in the Commission’s HHI analysis were modeled after the Department of Justice/Federal Trade Commission Guidelines. Beyond that, and as explained in the May 18 Order, matters involving alleged violations of antitrust laws are beyond the Commission’s jurisdiction.⁸⁷

l. May 18 Order Contained No Materially Incorrect Statements

87. MCC and Montana Commission argue that the Commission made materially incorrect statements about protestors’ filings, such as that protestors have not provided new evidence of PPL Companies’ ability to erect barriers to entry, did not submit support for using a 2007 test year and did not submit new calculations or analysis based on the

⁸⁶ *Id.* at 35-6.

⁸⁷ May 18 Order, 115 FERC ¶ 61,204 at P 64 *citing Californians for Renewable Energy, Inc.*, 98 FERC ¶ 61,085, *reh’g denied*, 98 FERC ¶ 61,269 (2002).

information in the protective agreement.⁸⁸ Based on this argument, MCC and Montana Commission further state that the Commission “clearly took no notice of [MCC’s] non-public Attachment A Analysis.”⁸⁹

88. The Commission considered all evidence and arguments submitted by both protestors and PPL Companies and responded to all protestors’ arguments in the May 18 Order. The fact that the Commission’s decision does not adopt the approach suggested by MCC and Montana Commission does not constitute a failure to take notice of MCC’s non-public Attachment A Analysis. Quite to the contrary, the Commission has explained in full why such an analysis was unpersuasive, otherwise inconsistent with Commission policy and technically flawed (*e.g.*, limiting all possible imports to the amount of ATC posted and ignoring the amount of capacity actually being imported during the study periods). Therefore, the Commission has already responded to the arguments made by MCC and Montana Commission and concludes there is no basis to reverse its findings from the May 18 Order.

The Commission orders:

MCC and Montana Commission’s request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁸⁸ MCC and Montana Commission Request for Rehearing at 38-39.

⁸⁹ *Id.* at 38.